BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANIEL W. THARP	)	
Claimant	)	
	)	
VS.	)	
	)	
INDUSTRIAL COMM. INSULATION, INC.	)	
Respondent	)	Docket No. **1,024,750**
	)	
AND	)	
	)	
HARTFORD UNDERWRITERS INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the September 24, 2007 Review & Modification Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on December 11, 2007.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Tracy M. Vetter of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant suffered a work-related injury to his low back on July 27, 2005. The parties settled the claim on August 2, 2006, but the right to review and modification of the award was left open. At the time of the settlement hearing the claimant was working for a different employer but he was laid off on September 22, 2006. The claimant filed an application for review and modification on September 25, 2006. Because he was no longer employed claimant argued that he was now entitled to a work disability (a permanent partial general disability greater than the functional impairment rating). Respondent argued that claimant's subsequent employment was the same work that he had performed for

respondent and demonstrated that he did not suffer a work disability. Consequently, he should not be entitled to a work disability.

The Administrative Law Judge (ALJ) found claimant sustained an increase in his disability and awarded him a 75 percent work disability based upon a 100 percent wage loss and a 50 percent task loss.

The respondent requests review of whether the ALJ erred in finding the claimant sustained an increase in his permanent partial disability. Respondent argues claimant has not met his burden of proof that he is entitled to a work disability. In the alternative, respondent argues claimant failed to make a good faith job search and a wage should be imputed to him. Respondent also argues that claimant is not entitled to workers compensation benefits during the time period claimant received unemployment insurance benefits.

Claimant argues the ALJ's Review & Modification Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was injured on July 27, 2005. He settled his claim for an approximate 5 percent permanent partial functional disability on August 2, 2006. Claimant's right to future medical as well as review and modification were left open. At the time of the settlement hearing the claimant was working for Midwestern Insulation earning a comparable wage.

On September 22, 2006, claimant was laid off from Midwestern Insulation. After he was laid off, claimant applied for and received $371 per week in unemployment compensation benefits from September 2006 through mid January 2007. Claimant also began a job search to satisfy both the requirements to qualify for unemployment benefits as well as to demonstrate good faith under the workers compensation system.

Claimant contacted several temporary placement agencies as well as checking newspapers. The job search log that claimant kept indicated that he generally made two contacts a day through late December 2006. There was then a gap where claimant did not look for work until February 2007 when claimant again resumed his job search. The claimant explained that he was forced to quit his job search when his back condition worsened and he could hardly walk. Claimant received epidural injections and when his back improved he resumed his job search. The claimant has been unable to find appropriate employment.

Dr. Sandra Barrett examined and evaluated the claimant at the request of respondent's attorney. Dr. Barrett first saw the claimant on November 16, 2005, due to complaints of neck and back pain. The doctor diagnosed claimant as having chronic low back pain and recommended a course of physical therapy with medications including a TENS unit. Dr. Barrett determined claimant had reached maximum medical improvement on February 8, 2006. Permanent restrictions were placed on claimant of no lifting greater than 30 pounds, occasional squatting, kneeling and crawling.

Dr. Barrett reviewed the list of claimant's former work tasks prepared by Mr. Steven Benjamin and concluded claimant could no longer perform 6 of the 14 tasks for a 43 percent task loss. Based upon the AMA *Guides*[1], Dr. Barrett opined claimant had 5 percent impairment to his lower back.

Dr. George Fluter performed an independent medical examination on claimant at the request of claimant's attorney. On September 15, 2005, Dr. Fluter took a history from claimant, reviewed medical records and performed a physical examination. The doctor diagnosed claimant as having low back and left buttock pain, lumbar strain/sprain, and myofascial pain affecting the low back and buttocks. Dr. Fluter placed temporary restictions on claimant of no lifting, carrying, pushing or pulling greater than 20 pounds occasionally and 10 pounds frequently; bending, stooping and twisting to an occasional basis and squatting, kneeling, crawling and climbing to an occasional basis. The doctor recommended anti-inflammatory medications and physical therapy which included modalities and therapeutic exercise as well as a TENS unit. Dr. Fluter also recommended possible interventional pain management procedures such as trigger point injections, facet joint blocks and lumbar epidural steroid injections.

On March 15, 2006, Dr. Fluter again examined and evaluated the claimant. The doctor updated claimant's history, reviewed medical records and performed a physical examination. The doctor diagnosed claimant as having low back and left buttock pain, lumbar strain/sprain, myofascial pain affecting the low back and buttocks and right hand numbness of unknown cause. Dr. Fluter determined claimant had reached maximum medical improvement. The doctor placed permanent restrictions on claimant of no lifting, carrying, pushing and pulling greater than 20 pounds occasionally and 10 pounds frequently; restrict bending, stooping and twisting to an occasional basis; restrict squatting, kneeling and crawling to an occasional basis. Based upon the AMA *Guides*, DRE lumbosacral Category II, claimant has a 5 percent impairment. Dr. Fluter reviewed a list of claimant's former work tasks prepared by Mr. Jerry Hardin. The doctor opined claimant sustained a 57 percent task loss.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Steven Benjamin, a vocational rehabilitation counselor, conducted a personal interview with claimant on April 30, 2007, at the request of respondent's attorney. He prepared a task list of 14 nonduplicative tasks claimant performed in the 15-year period before her injury. Mr. Benjamin opined claimant was capable of earning from $300 to $440 per week based on Dr. Fluter's restrictions and from $260 to $640 a week per Dr. Barrett's restrictions.

Jerry D. Hardin, a personnel consultant, conducted a personal interview with claimant on October 30, 2006, at the request of claimant's attorney. He prepared a list of tasks claimant performed in the 15-year period before his injury. Mr. Hardin concluded claimant was capable of earning $320 per week.

Initially, respondent argues that after claimant's injury and treatment he obtained work at a comparable wage with another employer performing the same type work that he had performed for respondent. Respondent further argues that this demonstrates claimant did not suffer a work disability.

The claimant's job duties for respondent included insulating pipe and performing duct work. After his accidental injury he returned to work for a different employer performing the same type of work. But claimant explained that he returned to work for a former employer who was helping him out by providing a job within his restrictions and with an assistant to perform the physical work that claimant could not perform. Claimant testified:

> Q. And if you would, just describe for us what type of work were you doing?
>
> A. Insulating pipe, duct work, just like a building like this with the duct work in the ceiling and piping. I don't know where this piping is at, probably down in a tunnel or something like that.
>
> Q. And you were able to perform those functions?
>
> A. A lot of the times -- I have known that employer since he was the first guy I went to work for when I got out of high school. And he was pretty much taking care of me, sending me help to do stuff that I didn't or couldn't do.[2]

[2] R.M.H. Trans at 17.

The evidence establishes that claimant was being provided accommodated work at Midwestern Insulation. Unemployment or job change due to economic change, such as a layoff, can result in a work disability.[3] In *Lee*[4], it was stated:

> It is not the intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere.

Retaining an employee in a job that pays a comparable wage artificially avoids a work disability until the worker is exposed to the open labor market wherein a work disability may be revealed.[5] Although claimant returned to work for another employer, the work was different than his work for respondent because his restrictions were being accommodated. And when he was laid off work he became entitled to a work disability analysis. Moreover, the Kansas Court of Appeals has determined that whether an injured employee is working at an accommodated position is irrelevant for purposes of a subsequent layoff or termination.[6] What is crucial is whether the injured employee's condition warrants restrictions which, in light of a subsequent termination, puts him or her at a disadvantage in the open labor market.[7]

Because claimant has sustained an injury that is not listed in the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in

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[3] *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[4] *Lee v. Boeing*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

[5] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d. 837, 936 P.2d 294 (1997).

[6] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005).

[7] *Id.* at 200.

> any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[10]

The claimant's job search indicates that he contacted from 8 to 10 prospective employers a week and he has simply been unable to obtain employment. He contacted temporary employment agencies but was told that there was nothing available due to his restrictions. There was a month gap in his job search when his back condition worsened and prevented him from looking for work but as soon as medical treatment improved that condition he returned to his search for employment. Claimant also searches the newspapers for possible jobs. The claimant has met his burden of proof to establish that he made a good faith effort to obtain employment. Accordingly, his actual wage loss of 100 percent will be used in the work disability formula.

Dr. Fluter reviewed a list of claimant's former work tasks prepared by Mr. Jerry Hardin. The doctor opined claimant sustained a 57 percent task loss. Dr. Barrett reviewed the list of claimant's former work tasks prepared by Mr. Steven Benjamin and opined claimant sustained a 43 percent task loss. The ALJ averaged the task loss opinions provided by Drs. Fluter and Barrett to find claimant suffered a 50 percent task loss. The Board agrees and affirms.

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[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[10] *Id.* at 320.

The work disability is determined by averaging the task loss with the wage loss.[11] Accordingly, the claimant has met his burden of proof to establish that he has a 75 percent work disability.

Finally, respondent's brief contains the argument that claimant was not entitled to receive any workers compensation benefits during the few months he received unemployment insurance benefits. No authority was provided to support this position. The Board cannot find any statutory or case law authority to support respondent's request and it is denied.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 24, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Tracy M. Vetter, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[11] K.S.A. 44-510e(a).